

MOTION FILED  
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No. 82-1147

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1982

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NATIONAL ELECTRICAL CONTRACTORS  
ASSOCIATION, INC., et al.,

Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, et al.,

Respondents.

---

ON PETITIONS FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

MOTION OF AMICI NATIONAL ELECTRICAL  
CONTRACTORS ASSOCIATION, ARIZONA CHAPTER,  
MASONRY INDUSTRY PROGRAM OF ARIZONA AND  
PIPING INDUSTRY PROGRESS AND EDUCATION FUND  
FOR LEAVE TO FILE AMICUS BRIEF  
IN SUPPORT OF PETITIONS  
AND  
BRIEF OF AMICI CURIAE

---

LEWIS AND ROCA

By JOHN P. FRANK

(Counsel of Record)

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Attorneys for Arizona NECA, *LEWIS AND ROCA*  
Arizona Masonry and Arizona PIPE

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IN SUPPORT OF PETITIONS FOR WRIT OF  
CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

AND

BRIEF OF AMICI NATIONAL ELECTRICAL CONTRACTORS  
ASSOCIATION, ARIZONA CHAPTER,  
MASONRY INDUSTRY PROGRAM OF ARIZONA AND  
PIPING INDUSTRY PROGRESS AND EDUCATION  
FUND (ARIZONA) IN SUPPORT OF  
PETITIONS FOR WRIT OF CERTIORARI

MOTION OF ARIZONA TRADE GROUPS  
TO APPEAR AMICUS

The Masonry Industry Program of Arizona (Arizona Masonry), the National Electrical Contractors Association, Arizona Chapter (Arizona NECA),<sup>1/</sup> and the Piping Industry Progress and Education Fund (Arizona PIPE), all of Arizona, respectfully move for leave to file an amicus brief in this cause.<sup>2/</sup>

The decision of the panel of the Fourth Circuit, in a case of first impression, falls directly not only upon the parties before this Court but also the American construction industry, generally. It greatly affects the national labor policy.

Whether the decision of the panel is correct or erroneous, its enormous national importance warrants consideration by this Court of the competing antitrust and national labor policy interests.

Respectfully submitted this 3rd  
day of FEBRUARY, 1983.

LEWIS AND ROCA

By /s/  
JOHN P. FRANK  
100 W. Washington St.  
Phoenix, Arizona 85003  
(602) 262-5311

Attorneys for Arizona  
NECA, Arizona Masonry  
and Arizona PIPE

- 
- 1/ The Movant Arizona NECA is functionally a party in Grant v. Commonwealth Electric Company, HM 79-1305, in the District Court, one of the removed cases which will be controlled by this case.
- 2/ Movants all appeared before the Fourth Circuit below as amici in this case. Pursuant to Rule 36, written consent to the filing of the brief was sought from all parties. Written consent of the various appellants in the Fourth Circuit accompanies this motion. Appellees below have not consented.

## Arent, Fox, Kintner, Plotkin &amp; Kahn

Washington Square 1050 Connecticut Avenue N.W.

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Donald M. Barnes  
(202) 857-6099

December 9, 1982

Jon E. Pettibone, Esquire  
Lewis and Roca  
First Interstate Bank Plaza  
100 West Washington Street  
Phoenix, Arizona 86003-1899Re: Amicus Appearance Before the Supreme  
Court in National Constructors Association,  
et al., v. National Electrical Contractors  
Association, et al.

Dear Mr. Pettibone:

We are counsel for Miller Electric Co. and Colgan Electric Company, Inc., two of the defendants in the above captioned litigation.

In response to your December 6, 1982 letter, please be advised that both Miller Electric and Colgan Electric consent, pursuant to U.S. Supreme Court Rule 16, to the filing of an amicus brief on behalf of your clients.

Very truly yours,

*Donald M. Barnes*  
Donald M. Barnes

DEC 13 1982

FARMER, McGUINN, FLOOD, BECHTEL & WARD  
SUITE 402  
1000 POTOMAC STREET, N.W.  
WASHINGTON, D.C. 20007  
(202) 338-8910

December 6, 1982

Jon E. Pettibone, Esquire  
Lewis & Roca  
100 W. Washington  
Phoenix, Arizona 85014

Re: NCA v. NECA  
Case Nos. 80-1808, 80-1809  
Fourth Circuit Court of Appeals

Dear Mr. Pettibone:

This will confirm our telephone conversation of today in which I indicated that the NECA defendants consent to your filing an amicus curia brief in support of our petition for certiorari on behalf of the Arizona Chapter of NFCA, the Masonry Industry Program of Arizona, and the Piping Industry Progress & Education Fund (Arizona). The petition is currently due January 7, 1983. We will send you a copy of our latest draft petition as soon as it is typed.

Very truly yours,

Guy Farmer

SEC 1 - 1392

[illegible]

செய்து கொடுத்திருக்கிறார்கள். இதைப் பற்றித் தனியாகச் சொல்ல வேண்டிய அவசியம் இல்லை. இதைப் பற்றித் தனியாகச் சொல்ல வேண்டிய அவசியம் இல்லை.

REPORTS DIRECT NUMBER (S)  
301 878-3635

December 10, 1982

Jon E. Pettibone, Esquire  
Lewis and Roca  
First Interstate Bank Plaza  
100 West Washington Street  
Phoenix, Arizona 86003-1299

RE: Amicus Appearance Before the Supreme Court in National Constructors Association, et al., v. National Electrical Contractors Association, et al.

Dear Mr. Pettibone:

We are counsel for the National Electrical Contractors Association, the trustees of the National Electrical Industry Fund and Robert L. Higgins, defendants in the above captioned litigation.

In response to your December 6, 1982 letter, please be advised that our clients consent, pursuant to U.S. Supreme Court Rule 36, to the filing of an amicus brief on behalf of your clients.

Very truly yours,

Peter H. Gunst

PHG:78

cc: Guy Farnor, Esquire

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December 10, 1982

Jon E. Pettibone, Esquire  
 Lewis and Roca  
 First Interstate Bank Plaza  
 100 West Washington Street  
 Phoenix, Arizona 85003-1899

Re: IDEW, AFL-CIO, et al. v. NCA, et al.  
 (U.S. Supreme Court)

Dear Mr. Pettibone:

In accordance with your request, please be advised that the petitioners, International Brotherhood of Electrical Workers and Charles H. Pillard, consent to your filing an amicus brief, on behalf of certain industry promotion funds in Arizona, in support of our petition for certiorari.

Yours very truly,

SHERMAN, DUNN, COHEN, LEIFER & COUNTS, P.C.

By

*Laurence J. Cohen*  
 Laurence J. Cohen

cc: Guy Farmer, Esq.  
 Peter H. Gunst, Esq.  
 James P. Garland, Esq.  
 Donald M. Barnes, Esq.



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ASSOCIATION, ARIZONA CHAPTER,  
MASONRY INDUSTRY PROGRAM OF ARIZONA AND  
PIPING INDUSTRY PROGRESS AND EDUCATION  
FUND (ARIZONA) IN SUPPORT OF  
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LEWIS AND ROCA

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BRIEF OF ARIZONA AMICI IN SUPPORT OF  
PETITIONS FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

I. Introductory Statement.

By its decision issued May 17, 1982, in this case which it characterized as one of first impression, a two-judge majority of a panel of the Fourth Circuit, over the vigorous dissent of Judge Hall, found that the collective bargaining relationships of the various parties had run afoul of the nation's antitrust laws.

More particularly, the majority concluded that the defendants illegally fixed prices in violation of the Sherman Act by establishing and maintaining, through the

collective bargaining process, an industry promotion fund. With only slight modification, the panel majority allowed the permanent injunction issued by the District Court to stand.

Others will address the merits of the panel majority's opinion in their petitions for certiorari. While amici National Electrical Contractors Association, Arizona Chapter (Arizona NECA), Masonry Industry Program of Arizona (Arizona Masonry) and Piping Industry Progress and Education Fund (Arizona PIPE), the latter quite probably being the oldest industry promotion fund in America, do not believe the panel majority reached an appropriate result, they submit that the critical issue at this juncture is whether the enormous and far-reaching impact of the panel majority's decision upon national policies warrants consideration by this Court.

## II. Analysis.

### A. Purposes of Industry Funds.

Industry funds sprang up in the United States about 1950. The original industry funds were based on clauses in the labor agreements which put a per hour contribution from every contractor covered by the labor agreement into a central account. The agreements were negotiated between trade associations and unions, and a considerable number of nontrade association contractors became signatories to the union agreements. These may be referred to by a variety of terms, but a common phrase is "independent signatories."

The earliest trade associations were corporations which collected funds for a variety of industry promotional subjects. An aftermath of the 1959 amendments to Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186, was the wide-spread reorganization of industry funds into trusts; both Arizona PIPE and Arizona Masonry use that form. Industry funds have spread broadly throughout the

United States and now are everywhere.

The fundamental purpose of an industry fund is to promote the welfare of a particular subdivision of the construction industry. This has two aspects, external and internal. In dealing with the world at large, the fund finances matters relating to codes, counsels on industry regulation, commonly gives the bulk of its attention to product promotion, and in general maintains a public relations program. The internal aspects of a fund program are also of major importance. We are frequently looking at hordes of small businessmen, many of whom may in the relatively recent past have been working with the tools and have branched into business for themselves. Seminars on estimating, programs for increased safety, educational programs on what to do with the pre-construction conference, how to document changes, understanding the building code, informing the participants of new laws affecting the industry - all these are simple tasks, chosen from voluminous lists.

All of these things take money, and they have an overhead and administrative component. Particularly if the drive is to deal with complaints, extensive inspections for the benefit of the public may be necessary, and this takes personnel.

B. Industry Funds are Indispensable to the Construction Industry.

The widespread use of the industry funds is responsive to a felt need. They are generally useful, and particularly where small businessmen are involved, they are indispensable. The giant conglomerates in the construction industry - the national contractors who brought this action - have the resources to be able to tend to these interests for themselves. The smaller contractors would be absolutely powerless before the giants as well as before other community pressures if they could not come together in some fashion. It would be hard to imagine any more clearly anti-competitive step than seriously crimping the industry funds. Witness this action; the big

boys may not need the funds, but the little ones surely do.

These programs are sponsored in the labor agreements. They necessarily are supported by the unions or they could not exist; they would not be in the agreements. Candor requires acknowledgment that this is for two reasons. First, there may well be trade offs. The unions predominantly want welfare, pensions or vacations as fringe benefits, and the employers want the industry funds as fringe benefits; both groups have legitimate interest in securing all the fringes. There is also a much larger factor. A good industry fund is serving the interests of the whole industry and, therefore, helps either make or preserve jobs. Masonry is a good example. If, in the Sun Belt, block disappears before the onslaught of unrelated materials, there will be no masonry contractors, there will be no masonry jobs, and there will be no masonry union. We over-simplify here in the interests of dramatically making the



point, but the point is there - these are interlocked benefits in the best sense that there will not be a piece of pie for anyone in the construction industry unless there is pie available for everyone.

C. The Decision Below Will Have Grave National Consequences.

This case does not simply involve the interests of the parties or the electrical construction industry, as a whole. This case is much bigger. If allowed to stand, the Fourth Circuit panel majority's decision, whether right or wrong, will have a devastating impact upon the construction industry wherein industry promotion funds have proliferated. Hundreds and quite possibly thousands of employer associations and certainly thousands of contractors throughout the United States will be directly affected. We most urgently request that before this hurricane is finally unleashed upon the land that it have the ultimate and comprehensive views of this Court.

III. Conclusion.

In view of the extreme national consequences of the Fourth Circuit panel majority's decision, we respectfully submit that the petitions for certiorari should be granted.

Respectfully submitted this 3rd  
day of FEBRUARY, 1983.

LEWIS AND ROCA

By 15/  
JOHN P. FRANK  
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Attorneys for Arizona  
NECA, Arizona Masonry  
and Arizona PIPE

AFFIDAVIT OF SERVICE

STATE OF ARIZONA            )  
                                  ) ss.  
County of Maricopa        )

JOHN P. FRANK, being first sworn,  
deposes and says that on this 3<sup>RD</sup> day of  
February, 1983, he caused to be mailed  
postage prepaid three copies of the Motion  
Of Amici For Leave To File Amicus Brief In  
Support Of Petitions For Writ Of Certiorari  
and of the Amicus Brief to:

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Kaye, Scholer, Fireman,  
Hays & Handler  
425 Park Avenue  
New York, New York  
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Forty copies of this Motion and Brief have also been filed this day with the Clerk of this Court.

/s/  
JOHN P. FRANK

Subscribed and sworn to before me  
this 3<sup>rd</sup> day of FEBRUARY, 1983.

/s/  
Notary Public

My Commission Expires:

\_\_\_\_\_